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Department of the Treasury

Bureau of Alcohol, Tobacco and Firearms

HANDBOOK

ATF H 5190.1

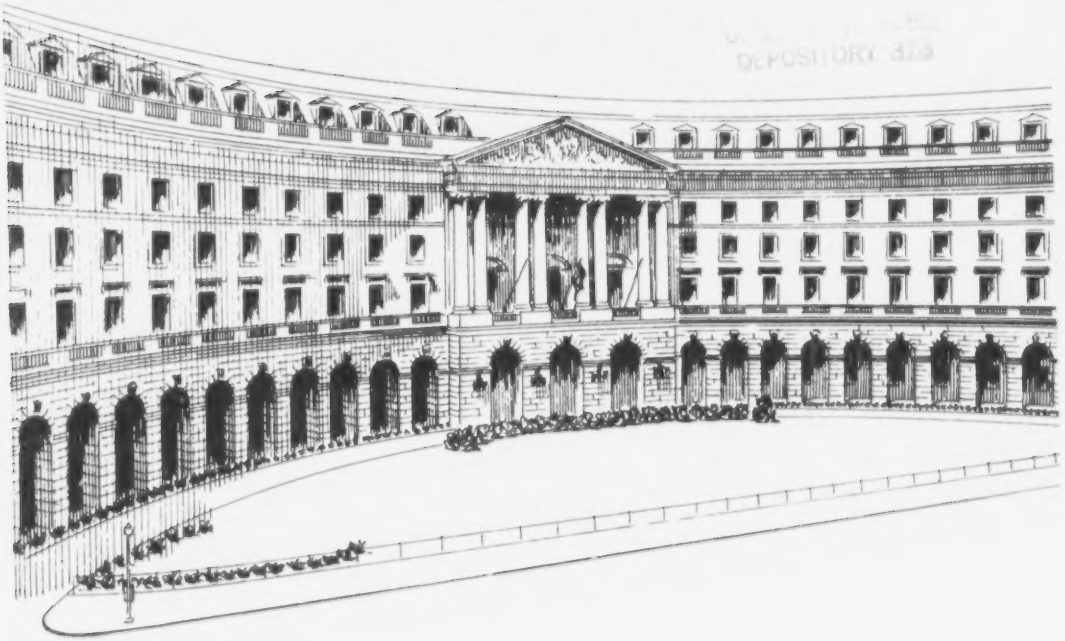
11/8/79

(Includes chg 1)

FEDERAL ALCOHOL ADMINISTRATION ACT

(FAA)

HANDBOOK



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FOREWORD

1. PURPOSE. This handbook outlines responsibilities, policy guidelines, and procedures to be followed in conducting FAA Act inspections.

2. SCOPE. The provisions of this handbook apply to all Regulatory Enforcement personnel.

3. CANCELLATION. This handbook cancels ATF P 5190.1, Sales Outlet Check (SOC) Program, Part 1-FAA Compliance Inspections, dated 11/74.

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CHAPTER A. INTRODUCTION

1. PURPOSE. This handbook discusses the FAA Act (sections 5a. - 5d.) in general and provides some guidelines for conducting FAA Act consumer protection investigations (of trade practice violations) at industry member and retailer premises. These procedures are not intended for indiscriminate use. Rather, each inspector should use these ideas and procedures as a supplement to his/her own techniques and methods for conducting the investigation. Additional audit techniques which may be used in FAA investigations are to be found in ATF H 5030.1, Regulatory Enforcement Audit Handbook.

2. OBJECTIVES OF FAA INSPECTION PROGRAM. The objectives of the FAA Investigation Program (trade practices) are to (1) promote fair competition among the liquor industry by identifying and reducing commercial bribery and other improper trade practices, through enforcement of sections 5a. - 5d. of the FAA Act, and (2) to enforce IRC law and regulations regarding recordkeeping and special tax stamps for members of the industry.

3. DEFINITIONS.

   a. Call Item. A call item is a particular brand of liquor or beer that a customer specifies when placing his order.

   b. Cumulative Discount. A discount that is determined on the basis of sales over a specified period of time.

   c. Industry Member. Industry member shall mean any person engaged in business as a producer, or as an importer or wholesaler of distilled spirits, wine, or malt beverages, or as a bottler, or warehouseman and bottler, of distilled spirits, but shall not include an agency of a State or political subdivision thereof, or an officer or employee of such agency.

   d. Subpoena Duces Tecum. A subpoena duces tecum is the process by which a person is compelled to produce before a court or other officer books or papers pertinent to a matter lawfully before him.

   e. Trade Buyer. Trade buyer shall mean any person who is a wholesaler or retailer of distilled spirits, wine, or malt beverages.

f. Well Item. A well item is the liquor or beer automatically served to a customer if he doesn't specify a particular brand when more than one brand is available.

g. Combination Sales. Items sold in combination with each other normally at a larger discount than if purchased separately (also known as family plans, round robins, etc.).

h. National Accounts. Retailers which have outlets throughout the country with purchasing decisions normally vested in the home office.

i. Laid-In-Cost. That cost incurred by a wholesaler or supplier to place the goods in inventory, consisting of such costs as manufacturer's invoice price, freight, and State and local taxes.

j. Charge Back. Normally, a situation where a wholesaler receives remuneration from a supplier for promotional expenses, kickbacks, etc., incurred by the wholesaler on behalf of the supplier.

k. Post Off. A published discount from a supplier for a specific period of time on a specific product; (e.g., X Bourbon discounted at $5 per case for the month of June 1979).

CHAPTER B. THE FEDERAL ALCOHOL ADMINISTRATION ACT

4. PURPOSE. The FAA Act was enacted to effectively regulate interstate and foreign commerce in distilled spirits, wine, and malt beverages, to enforce the 21st amendment, and to protect the revenue and enforce the postal laws with respect to distilled spirits, wine and malt beverages.

5. SYNOPSIS OF FAA ACT.

   a. Unlawful Business Without Permit (27 U.S.C. 203). Section 3 of the Act requires the following industry members to obtain a permit before lawfully engaging in interstate or foreign commerce: importers and wholesalers of distilled spirits, wines, or malt beverages; distillers; winemakers; rectifiers or blenders of distilled spirits or wines; and bottlers and warehousemen of distilled spirits.

   b. Unlawful Trade Practices (27 U.S.C. 205). Certain trade practices are prohibited by section 5a.- 5d. of the Act. They are:

      (1) Exclusive Outlet. Occurs when by agreement or otherwise a retailer is forced to handle an industry member's product to the total or partial exclusion of a competitor's products.

      (2) Tied House. Occurs when an industry member either "buys in" and/or furnishes something of value to a retailer's business, thereby inducing him to purchase his products, to the total or partial exclusion of a competitor's products.

      (3) Commercial Bribery. Occurs when an industry member "pays off" or otherwise induces by offering or giving (a bonus, premium or other compensation) secretly or otherwise, to employees, officers, or representatives of the trade buyer in order to promote the purchase or sale of his products to the total or partial exclusion of a competitor's product(s).

      (4) Consignment Sales. Occurs when an industry member leaves goods with a trade buyer on the condition that they be paid for only if sold. Consignment sales also include sale with the right of return between an industry member and trade buyer.

(5) Elements Necessary for a Trade Practice Violation. The trade practices described above may be considered violations of the FAA Act if certain conditions exist. A complete review of the elements required to prove trade practice violations are listed in chapter C, paragraph 15 of this handbook.

c. Other Unlawful Practices.

(1) Restrictions are also placed on bulk sale and bottling of distilled spirits, and interlocking directorates for companies distilling, rectifying, or blending distilled spirits (27 U.S.C. 206, 208).

(2) Deceptive Labeling. The FAA Act makes it unlawful to label distilled spirits, wine, or malt beverages except in accordance with applicable regulations as set forth in 27 CFR Parts 4, 5, and 7.

(3) Deceptive Advertising. The FAA Act prohibits an industry member from using any advertising medium unless the advertisement is in conformity with the regulations as set forth in 27 CFR Parts 4, 5, and 7. This prohibition applies when the advertisement is sent by mail, or it is in, or is calculated to induce sales in, interstate or foreign commerce.

d. Report of Violations. ATF F 5030.5, Report of Violations, is not issued for trade practice violations.

6. INTERPRETATIONS AND EXAMPLES OF TRADE PRACTICE VIOLATIONS.

a. Exclusive Outlet (27 U.S.C. 205(a)).

(1) This subsection prohibits the industry member from requiring a retailer, by agreement or otherwise, to buy the member's products to the exclusion, in whole or in part, of any distilled spirits, wine, or malt beverage products sold by others in interstate or foreign commerce. The inspector must remember that the element of compulsion or coercion is essential to proving a violation of this section. The effect to interstate commerce can be shown in one of three ways; (1) the requirement was made in the course of interstate or foreign

commerce; or (2) the direct effect of the requirement is such as to restrict or deter sales or offers of sales concerning other similar products moving in interstate commerce; or (3) the practice is so intensive as to restrain other industry members from selling similar products in interstate commerce. This subsection does not prohibit an industry member from operating a fully owned retail outlet, even though it is done for the purpose of excluding a competitor's products. Additionally, a retailer may of his own accord sell one industry member's line of beverages.

(2) Examples of coercion the industry member might attempt are the following: (1) cutting off the retailer's source of supply; (2) requiring the purchase of items in plentiful supply as a prerequisite for the purchase of short supply items; (3) offering discounts or cash rebates on the condition that the retailer purchase exclusively from the seller; (4) seller being in a position to exert influence over the issuance of a retailer's license.

b. Tied House (27 U.S.C. 205(b)). This subsection prohibits any industry member from inducing a retailer to buy from him, by any of the seven methods listed below, if the inducement then results in the exclusion, in whole or in part, of distilled spirits, wine or malt beverages which move in interstate or foreign commerce. The same interstate commerce element cited under paragraph a., Exclusive Outlet, is essential. The seven unlawful inducements are:

(1) Acquiring or holding an interest in a retailer's license. Example - industry member loaning retailer money to help pay for his license fee. However, complete ownership of the retailer's business would not be a violation, since one cannot "induce" oneself.

(2) Acquiring an interest in property used by the retailer in his business. Example - industry member acquiring partial stock ownership of a retail dealer corporation, renting display space to or from a retailer, having an interest in the building or equipment used by the retailer, or acquiring an interest in mortgages on the retailer's land, building equipment; etc.

(3) Furnishing things of value to the retailer. Examples: (1) giving free one type of alcoholic beverage for the purchase of another type alcoholic beverage (e.g. one case of beer for each case of whisky purchased); (2) promoting a particular retailer in advertisements (radio, television, publications); (3) donating door prizes at RLD conventions; (4) advertising in RLD association periodicals or buying tickets to parties given by retailer; (5) furnishing gifts to retailers as a reward for a good job of merchandising; (6) sponsoring parties or dinners for RLD associations and helping collect dues from retailers for, or giving financial support to, such associations; (7) furnishing advertising displays of excessive cost and furnishing excessive samples; and (8) contributing merchandise, gifts, or services to retailer's grand opening parties. INSPECTORS SHOULD READ 27 CFR 6.21 - 6.31, REGARDING EXCEPTIONS TO THE TIED HOUSE PROVISIONS OF THE FAA ACT.

(4) Paying or crediting the retailer for advertising, display, or distribution services. Example - industry member placing cooperative advertising with retailers, buying display space in a supermarket or package store, and placing advertising in retailer association publications.

(5) Guaranteeing a loan of the retailer. Example - industry member cosigning a retailer's note, or making a discount, rebate, or refund conditioned on its being applied by the retailer to pay off a loan.

(6) Excessive credit (27 CFR Part 8). The inspector should be familiar with the "Official Interpretation of Credit to Retailers Regulations." While 27 CFR Part 8 establishes 30 days from date of delivery as the credit period usual and customary to the liquor industry, this does not mean that an industry member would automatically be in violation if he continued selling to a retailer who was 30 days or more in arrears on his account. For example, if in a certain trade area, all the suppliers extend credit for a specified period of more than 30 days, there is little likelihood, because of the difficulty of showing exclusion, that this section of law will be violated.

(7) Quota Sales. This violation occurs when an industry member requires a retailer to take a quota of goods each week, month, etc., or the retailer is required to take a quota of an undesired product in order to obtain a desired product. Keep in mind that quota sales differ from minimum sales established by an industry member (e.g., a $50 minimum order requirement before goods will be delivered).

(8) General comments regarding tied house violations (27 U.S.C. 205(b)).

(a) The inspector must keep certain things in mind in charging violations under the tied house section of the FAA Act: (1) this section, 205(b), covers practices between industry members and retailers only; (2) the value of the gift is not material except as to its power to induce the retailer; and (3) with regard to the "furnishing..." clause cited in section 205(b)(3) of the Act, inspectors should be thoroughly familiar with the exceptions cited in 27 CFR Part 6, Inducement Furnished to Retailers.

(b) Inspectors should understand that "so-called free goods," discounts, rebates, refunds and price reductions may be nothing but a pricing arrangement. These arrangements are permissible under section 5(b) of the Act, if made at the time of sale, unless they involve the imposition of a quota, are used as a subterfuge to hide a gift, or result in a price to the retailer of less than the supplier's "laid-in" cost. Inspectors should be aware of the provisions set forth in Rev. Ruling 54-161 and ATF Ruling 76-16.

c. Commercial Bribery (27 U.S.C. 205(c)). A commercial bribery violation occurs when an industry member pays money or makes a gift directly or indirectly to an employee or agent of a trade buyer to induce him to push the member's products, or if the industry member makes outright financial contributions to employee organizations of trade buyers. Some examples of commercial bribery are: (1) gifts to purchasing agents, clerks, bartenders, salesmen, and other employees with or without the trade buyer's knowledge; (2) payments

or gratuities to groups or associations of trade buyer employees; and (3) payments of a substantial part of the cost of prizes given to salesmen of a wholesaler during a sales promotion contest. The inspector must be aware that this subsection differs from the previous two, Exclusive Outlet and Tied House, in that it also applies to industry members who attempt to influence purchases by wholesalers as well as retailers. Also, under this subsection an offer of an inducement whether consummated or not is sufficient in showing a violation if: (1) inducement is made in the course of interstate or foreign commerce, (2) inducement substantially restrains or prevents transactions in interstate or foreign commerce, or (3) the inducement had the effect of preventing, deterring, hindering, or restricting others from selling or offering for sale products in interstate or foreign commerce.

d. Consignment Sales (27 U.S.C. 205(d)).

(1) This subsection of the Act prohibits an industry member from selling, offering to sell, or contracting to sell to any trade buyer or for any such trade buyer purchasing, offering to purchase, or contracting to purchase products offered by an industry member: (a) on consignment; (b) under a conditional sale; (c) with the privilege of return; or (d) on any basis other than a bona fide sale.

(2) Keep in mind this subsection does not apply to bona fide returns of merchandise for ordinary and commercial reasons such as (a) receipt of merchandise other than ordered; or (b) merchandise not able to be lawfully sold; or (c) merchandise returned on termination of franchise.

(3) This subsection differs from the preceding subsections in that the trade buyer can be criminally prosecuted under section 7 of the Act if he purchases or agrees to purchase goods on consignment. If found guilty, he is subject to a $1,000 fine for each offense. Additionally, if the consignment sale itself occurs in interstate commerce, then proving exclusion is not required.

(4) Consignment sales are generally understood to be those wherein the trade buyer is informed by the seller that he is under no obligation to pay for

the products until he sells them, or if the buyer has the right to return any unsold portion. The inspector should realize that such an arrangement may also involve a violation of section 205(b)(6) of the Act relating to the granting of excessive credit. Also, mere offers to sell or buy, either at the time of agreement, or in the future, may constitute a violation.

7. RECAP TABLE - TRADE PRACTICES VIOLATIONS. See exhibit 1.

8. STATUTE OF LIMITATIONS (27 U.S.C.204(i)). Section 204(i) of 27 U.S.C. provides in part that no proceeding for the suspension or revocation of a permit for any violation of the law shall be instituted if more than 3 years have elapsed since the violation occurred, and that if a prior violation has been compromised, no action can be taken against a basic permit based on that particular violation. However, annulment proceedings may be brought against a permit at any time if it was obtained through fraud or misrepresentation of material fact. In lieu of taking criminal action, an offer in compromise (27 U.S.C. 207) may be obtained from an industry member if the violation occurred within 5 years (18 U.S.C. 3282).

9. PENALTIES FOR FAA VIOLATIONS (27 U.S.C. 204(e)).

   a. Since a basic permit is conditioned upon compliance with the requirements of sections 5 and 6 of the FAA Act and with all Federal laws relating to distilled spirits, wine, and malt beverages, violations of such conditions may lead to denial, annulment, suspension, or revocation of permits under the Act. However, for a first violation the permit shall be subject to suspension only.

   b. Section 7 of the Act also provides for monetary and other penalties for violations of sections 3 and 5 of the Act as follows: (1) a fine of not more than $1,000 for each criminal offense (upon conviction in a court of law) in violation of these subsections; or (2) an offer in compromise of not more than $500 for each offense; and (3) a consent decree to be entered where repetitive violations have occurred and in order to avoid multiplicity of criminal proceedings.

10. PERTINENT REVENUE AND ATF RULINGS. A synopsis of the various rulings that have been issued regarding potential trade practice problems are included as exhibit 2 (full

texts of ruling may be found in the CCH). Inspectors should use these rulings as reference material, since many of the questions that may arise during their investigations may have already been the subject of one of these rulings.

CHAPTER C. FAA INVESTIGATIONS - GENERAL INFORMATION

11. AUTHORITY OF ATF TO INVESTIGATE VIOLTIONS OF THE FAA ACT.

a. Chief Counsel has taken the position that ATF does have authority to investigate violations of the FAA Act and will approve the issuance of subpoenas in an appropriate case. Whether subpoenas can or cannot be issued in a particular case should not inhibit an inspector from requesting any records that he or she wants to examine.

b. Inspectors will notify the area supervisor when an industry member or retailer refuses to produce records necessary to conduct the investigation. The area supervisor will determine whether to notify regional management that a subpoena is necessary. If regional management decides a subpoena is warranted they may request through the AD(RE) the issuance of a subpoena.

12. EXAMINATION OF TAXPAYER'S BOOKS OF ACCOUNT 26 U.S.C. 7605(b).

a. Inspectors need not be concerned about examining proprietor's records which constitute his books of account, i.e., purchase, sales, general, and accounts receivable journals; cash receipt and cash disbursement ledgers; check register, etc., insofar as it would jeopardize a subsequent audit by Internal Revenue Service for the same taxable year. Inspectors should however, be aware of the limitations imposed by 26 U.S.C. 7605(b). This section of the law provides that no taxpayer shall be subjected to unnecessary examination or investigations, and only one inspection of the taxpayer's books of account shall be made for each taxable year.

b. The Office of Chief Counsel has taken the position that an examination of the books of account of a taxpayer for alcohol, wine, beer, and tobacco taxes would not restrict the second inspection or inspection of the taxpayer's books of account by the Internal Revenue Service for income or other taxes. Also Chief Counsel believes that section 7605(b) does not apply if the purpose of the investigation or inspection is solely for determining whether there has been compliance with the FAA Act. This would be true regardless of what books of account are examined or the extent of the examination.

13. MIRANDA WARNING - RIGHT TO REMAIN SILENT. An inspector will not normally give the Miranda warning or advise anyone of his rights under the fifth amendment. However, in some situations the U.S. attorney or the regional regulatory administrator may authorize the inspector to give these warnings to persons who may be potential defendants. In some situations an attorney may request that his client be advised of his rights. In this event, the inspector should inform the attorney that the investigation is currently an administrative one, and does not necessitate that anyone be advised of his rights. However, where criminal activity is suspected or the inspector feels that the investigation has prosecutive appeal, the area supervisor should be contacted. The area supervisor through the CFO will determine the advisability of bringing in Criminal Enforcement for a joint investigation.

14. ENTRY RIGHTS - INDUSTRY MEMBER'S PREMISES. Inspectors should not normally experience any difficulty in obtaining entry since most industry members are accustomed to seeing inspectors on a fairly regular basis. In the event inspectors are refused admittance, advise the proprietor of your entry rights under the provisions of 26 U.S.C. 5146 and 7606, and advise him of the penalty provided for in 26 U.S.C. 7342 (which is $500 for each refusal). If admittance is still refused, contact the area supervisor. The area supervisor may request regional management to issue an order to show cause. Under no circumstances should inspectors make a forcible entry.

15. ELEMENTS REQUIRED TO PROVE TRADE PRACTICE VIOLATIONS.

    a. It may be illegal for an industry member to give an INDUCEMENT directly or indirectly to a trade buyer. Inducements may constitute either the giving, renting, lending, or selling of items to a trade buyer. For example, the sale of a draft beer unit by an industry member to a retailer could result in a trade practice violation. Inspectors should read 27 CFR 6.21-6.31 in order to determine what merchandise, services, and samples industry members may furnish, sell, or give to retailers without violating the FAA Act. However, inspectors should be aware that some illegal inducements used by industry members while appearing to, do not fall under the exceptions listed in part 6.21 - 26. Some examples are:

        (1) Many industry members require retailers to purchase a specific amount of beer, wine, or

liquor in order that the retailers be furnished a certain inside sign for their establishment. This type of transaction would be an illegal one due to the fact that 27 CFR 6.21 (general section relating to exceptions) prohibits furnishing of various equipment, signs, or supplies if given on the condition of a purchase of distilled spirits, wine, or malt beverages.

(2) Many industry members give to a retailer samples of products which have been previously purchased by that retailer. This practice could violate the Act due to the fact that 27 CFR 6.29 allows industry members to give specific amounts of any one brand of distilled spirits, wine, or malt beverages to a retailer, ONLY if the retailer has not previously purchased that particular product.

b. Some other important factors to remember concerning inducements are:

(1) In perfecting a case regarding exclusive outlet, the element of inducement need not be proven. However, the fact that the retailer was REQUIRED to purchase the industry member's products must be proven.

(2) In perfecting a case regarding tied house, the offer of an inducement alone is not sufficient in proving a tied house violation.

(3) It is illegal for an inducement, which results in exclusion and affects interstate commerce, to be given directly or INDIRECTLY by the industry member to the retailer. Many cases have arisen where the industry member gave money to another industry member or nonrelated (to liquor industry) business entity for further transfer to a retailer. In one situation an industry member inflated the amount of his legitimate payments to an outside sign company for completed sign work. The sign company then proceeded to execute bogus retail contracts with clients (retailers) of the industry member. Payments were then made by the sign company to the clients (retailers) of the industry member in the amount of the inflated payments made to the sign company by the industry member.

c. The inducement given by the industry member to the trade buyer must result in EXCLUSION in whole or in part of other products sold or offered for sale by other persons in interstate or foreign commerce if interstate commerce is affected as shown in d. below. Many inspectors are of the opinion that for exclusion to be present the excluded product must be completely removed and replaced with the inducing industry member's products. This theory is not correct. An example of partial exclusion would be a beer wholesaler providing a free beer cooler or coolers at no cost to a retailer which results in a drastic drop in the purchases of other beers which were carried on draft by the retailer before the inducement was furnished. For a consignment sale that occurs in interstate commerce, the proving of exclusion is not required.

d. The element of INTERSTATE COMMERCE must be affected in one of the following manners:

(1) The inducement must be made in the course of interstate or foreign commerce (see c. above).

(2) The industry member or trade buyer engages in such practice to such an extent as to substantially restrain or prevent transactions in interstate or foreign commerce of any such products.

(3) The direct effect of the inducement is to prevent, deter, hinder, or restrict other persons from selling or offering for sale products to such retailer in interstate or foreign commerce.

e. TO PROVE A VIOLATION OF A TRANSACTION INVOLVING MALT BEVERAGES, THE STATE IN WHICH THE VIOLATION IS ALLEGED TO HAVE OCCURRED MUST EITHER HAVE ADOPTED THE PERTINENT SECTION OF THE FAA ACT, OR IT MUST HAVE A SIMILAR STATE LAW. THE STATE LAW AFFECTED NEED NOT BE A STATE LIQUOR LAW.

f. On sales of malt beverages to the military, section 5 of the Act applies if: (1) the State does not have a treaty with the United States giving the State the power to govern sales of alcoholic beverages on military installations; or (2) the State does have a treaty with the United States AND has enacted similar legislation. Section 5 of the Act does not apply if the State has a treaty with the United States AND has not enacted similar legislation.

CHAPTER D. FAA INVESTIGATIONS - GENERAL TECHNIQUES

16. INTRODUCTION. Each investigation of an unfair trade practice violation is unique unto itself; therefore, no attempt will be made to describe all procedures that might be used. Inspectors will use their imagination and ingenuity in devising an approach to the inspection.

17. FIELD WORK PREPARATION. Prior to visiting industry members or retailers, inspectors should review all ATF rulings, industry circulars, and regional memos pertinent to the type of FAA investigation assigned. If assigned an investigation concerning malt beverages, the inspector, in order to determine what trade practices are lawful or unlawful, should thoroughly review the State liquor code or other pertinent State laws of the State or States involved in the investigation. This will preclude needless work when a State allows specific trade practices which are unlawful under the FAA Act.

18. SOURCE OF LEADS.

    a. Discharged or Disgruntled Employees. They are frequently a source of good leads to violations, since they often make copies of incriminating evidence and in many cases were directly involved in the illegal transaction. Try to obtain copies of any evidence which might consist of signed memos, invoices, letters tendering special offers, contracts or sales agreements, and lists of customers who have received special deals. The inspector should attempt to obtain a sworn statement from the discharged or disgruntled employee detailing the illegal acts he witnessed. If this request upsets the employee, merely prepare a Report of Interview. However, keep in mind that many of these employees may be making a "sour grapes" complaint that is not warranted.

    b. Legitimate Liquor Industry. Many FAA cases originate from information furnished by members of the legitimate liquor industry. Many of these industry members are injured by illegal trade practices conducted by other industry members and they may be willing to give ATF information concerning firsthand or hearsay evidence they have encountered. Be careful not to mention who is the target of your investigation when interviewing other industry members. Never divulge to others the names of industry members who provided information. As stated in the previous paragraph,

you should attempt to obtain a sworn statement from an injured industry member and should be aware of the possible "sour grapes" complaints which are sometimes given by competitors. Many inspectors develop a good working relationship with certain industry members and obtain various information from these sources; however, the inspector should not become too friendly to these industry members since they (informing industry members) may eventually become the subject of an FAA investigation. In many cases industry members who have been investigated by ATF are willing to give information concerning trade practices of their competition. This is due to the fact that they have been penalized and they feel that their competition should be penalized.

c. Other Federal and State Agencies. Establish a good working relationship with State liquor agencies' personnel when possible. These agencies can be a valuable source of leads to illegal trade practices within their State. Many times a State lacks the manpower requirements necessary to conduct an investigation and therefore is glad to refer information for ATF's use. Never agree to trade information with State agencies unless advised to do so by your supervisor. Inspectors must be aware when conducting FAA investigations in control or monopoly States of their possible sensitive nature. Thus, considerable tact must be exercised during the course of such investigations in these States. Also, other Federal agencies are a good source of information concerning FAA investigations due to the fact that they may have uncovered information that could help ATF in an investigation. Useful relationships with these agencies may occur; however, it is not the inspector's job to set up this liaison. If the inspector becomes aware of another Federal agency having useful information, he/she should contact his/her supervisor. As in dealing with State agencies, the inspector should never agree to trade information with the Federal agency unless advised to do so by the supervisor.

d. Equipment Supply Houses.

(1) Discreetly contact local equipment supply houses when you suspect an industry member has ordered equipment on behalf of a retailer and for which the member either pays or guarantees the payment. Be alert to any COD shipments of major equipment

to the retailer, since most supply houses will not make this type of shipment unless payment is guaranteed by someone (probably the wholesaler).

(2) If the inspector becomes aware of a wholesaler ordering equipment through one of the national equipment supply houses on behalf of retailers, the inspector could request a collateral inspection (through his supervisor) of the equipment supply house. The inspection should determine which retailers have received equipment through the wholesaler and what is the company's policy in regard to who is responsible (wholesaler or retailer) for payment of the equipment. This collateral inspection request should only be initiated when the inspector is reasonably sure that the wholesaler is ordering certain supply houses' equipment for retailers. Note: We have no statutory authority to inspect equipment houses. In order for the inspection to take place there must be voluntary cooperation on the part of the equipment supplier.

(3) Additionally, wholesalers may use a supply house catalog as an inducement by convincing the retailer that they can obtain the equipment at half the list price. Should the retailer act on the wholesaler's alleged service and exclude a competitor as a result, a violation of the Act could result.

e. Trade Journals. Inspectors may review local trade journals in order to determine the current industry trends within the area covered by the investigation. Also, determine if any remarks are made concerning State violations or any ongoing Federal or State investigations of the industry member being inspected. Sometimes local trade journals contain stories (including pictures of company personnel) on the industry member being investigated which could aid the inspector in familiarizing himself with the suspect company's operations.

19. INVESTIGATION OF INDUSTRY MEMBER'S PREMISES.

a. This part of an FAA investigation is the most important since it normally uncovers most of the damaging information concerning illegal trade practices committed by the industry member. The inspector

should examine the basic permit, special tax stamp, and any State licenses or permits which are required to be kept at the industry member's premises. Information from the basic permit, such as the principal owners or officers, date of commencement of business, additional storage locations, and territory covered, should be noted for future reference.

b. A tour of the industry member's premises (including all of the storage warehouses) should be accomplished as soon as possible upon entering the premises. The inspector should look for evidence of inducing materials such as beer coolers, appliances, and expensive advertising materials. Also, look for beer, wine, or liquor which is normally not distributed by the industry member (for example cases of whiskey at a beer wholesaler).

c. In some cases, the inspector could take inventories and make accountings of beer or selected brands of liquor or wine at the wholesaler's premises. This would be done if the inspector believes the wholesaler is getting free goods from a supplier to buy new accounts or, if the inspector believes the wholesaler is buying new accounts by giving free goods. However, this will be cleared first with the area supervisor, since it can be a time-consuming process at large dealers. An overage in an account can be indicative of uninvoiced goods from the producer, while a shortage may indicate that the industry member is giving free goods to retailers.

d. Gain an understanding of the industry member's methods of recordkeeping; inventory control, posting sales/ purchases, processing merchandise returned, purchase or sale of nonbeverage items (glasses, pitchers, television sets, pool tables, etc.), records of equipment sales, and purchases, etc. Compare the State report (if required), with the Federal records of sales and purchases. Inspectors should be aware of the fact that some industry members maintain another business (i.e., soft drink manufacture and distribution) at their location and may use this business to purchase inducing materials or launder money. Also, if possible, you may want to examine invoices on file from maintenance, repair, or renovation companies.

e. Be alert to vague or unusual expenditures listed as "promotion" or "advertising" in the ledger accounts. This may veil a variety of inducement expenses. Since a producer may pay for an inducement in its entirety or share it with his distributor, vague references to these types of expenditures should be checked out. Look for memos or invoices covering credits or charges.

f. Examine expenses of the industry member's representatives or salesmen. "Promotion" type expenses may conceal many types of inducements, including cash payoffs. Examine salesmen's original order forms, expense accounts, and/or "route books" or "diaries," since these documents may contain notes regarding payments or credits or other inducements offered or given to retailers.

g. The inspector could list names of new retail accounts for possible field investigation.

h. Many FAA cases are made through a thorough examination of industry members' records. Therefore, the inspector should maintain an understanding of the techniques to be used while examining records at the industry member's premises. A more detailed list of suggested techniques to be used on specific types of FAA investigations is included in chapter E of this handbook.

i. An inspector conducting an FAA investigation should be aware of possible IRC (Internal Revenue Code) violations when conducting inspections of industry members. In many cases, IRC recordkeeping violations are the result of FAA violations or vice versa. An example of this would be a WLD who manipulates his disposition records in order to give free goods to retailers. In some cases the specific information, as where the free goods were delivered, is impossible to determine. However, the fact that disposition records were manipulated can be proven through examination of the disposition records.

j. If your investigation of the records produces evidence of inducements given by the industry member, you should normally talk to him to determine the names of the retailers involved. The industry member may be willing to cooperate with you and give the names of these retailers. If the wholesaler asks that his

retailers not be visited in exchange for this disclosure, you should not comment on this request. Immediately contact your area supervisor concerning this situation, in order that a management decision on this request be made. Admission statements taken from industry members should include a detailed explanation of all violations committed. This explanation should include the names and addresses of retailers who received inducements, the dates of the receipt of inducements, a complete description of the inducement (i.e., Perlick portable draft unit, a stainless steel beer line, two free half barrels of X beer, $250 in cash), who specifically received and/or negotiated the inducement for the retailer, and a list of competitive products excluded from being sold to the retailer due to the inducement.

k. Inspectors should not discuss their proposed recommendations, i.e., suspension, offer in compromise, etc., with industry members; nor should they suggest a monetary amount that would be acceptable for an offer in compromise. To maintain consistency throughout the Bureau it is necessary that these actions be a responsibility of management.

l. ATF F 5030.5, Report of Violations, will not be issued for trade practice violations.

20. INVESTIGATION AT RETAILER'S PREMISES.

a. Although retailers do not hold FAA Basic Permits to operate, they are still subject to ATF inspection because of the special tax stamp requirement, and the records of receipt they are required to maintain under part 194 of the Liquor Dealer Regulations and 26 U.S.C. 5124. Legal authority for the inspector to enter the premises during normal business hours for the inspection of required records is provided in section 5146, while section 7606 provides authority for entry of premises for examination of taxable objects. Section 7602 provides authority for the examination of books relative to a tax liability.

b. In the unlikely event that the retailer refuses entry to his premises or refuses to permit examination of the liquor stock, he will be informed that he is subjecting himself to a $500 forfeiture for each such refusal under 26 U.S.C. 7342. If entry is still refused, the inspector should then notify his/her

supervisor for referral to Criminal Enforcement (see ATF O 5030.2A, Related Inspection Activities, or ATF O 3330.4, Alcohol Enforcement Program). Forcible entry should not be made to the premises without a search warrant, since this has been held by the U.S. Supreme Court to violate the proprietor's constitutional rights. Regional counsel and Criminal Enforcement will be contacted in the event that it is determined a search warrant is needed.

c. During a retail inspection be alert to (1) elaborate package displays; (2) numerous expensive inside signs; and (3) consumer and retailer advertising specialties of an industry member. Record the manufacturer and serial number of the tapping equipment for a future check at the equipment dealer in the event that you suspect an industry member has supplied the equipment to the retailer.

d. In some cases the inspector should inventory a specific product(s) (usually the product you feel is being given free or off invoice), and compare the inventory with the purchase invoices maintained by the retailer in order to determine if the retailer is receiving free goods or purchasing products off invoice. If the inspector is suspicious of the retailer receiving equipment from an industry member, he/she should request that the retailer show him/her a canceled check or receipt and purchase invoices concerning the equipment in question. Or you may ask the retailer if he is depreciating the equipment, as many times they do not if they did not purchase it themselves. Inspectors should be aware of the fact that some industry members use free goods or cash to reimburse a retailer for equipment purchased.

e. Check to see if one supplier's products are exclusively or predominantly for sale. In the case of spirits, look at the retailer's well or speed rack to ascertain what he is using for the bar brand. These are the lines suppliers may be willing to deal on, whereas the back bar or call items are usually a matter of customer preference. When the retailer is a franchisee or part of a chain-type establishment, visit other locations to see if a similar pattern exists.

f. Examine files containing invoices and other related documents. You may find correspondence or other

information which will indicate or confirm the existence of an inducement. For example, when checking summary recap sheets or other records that the retailer prepared of his purchases you may find, next to the total, a dollar figure indicating a per unit kickback. He may use a similar system to indicate his payments to a supplier for equipment purchased on credit.

g. Be on the lookout for anything that would result in payments to the retailer such as: (1) billings to a supplier for services rendered only in part or not at all; (2) payments from third parties that may be representing the supplier, such as advertising agencies; or (3) consulting and service-type contracts where the retailer is paid a fee for services to be performed that are not commensurate with the prevailing rates paid on bona fide agreements. If the fee is in line for similar type agreements, check to see what services were actually performed (they may be nonexistent). These are examples of ways a supplier can get an inducement under the guise of legitimate business.

h. Examine franchise agreements to see if the retailer is required to use particular products. It is very possible that the franchiser is involved in a deal with a major supplier or producer.

21. INTERVIEW PREPARATION AND TECHNIQUES.

a. Preparation. Compile a list of retailers and other persons whom you want to interview. This listing will have to be updated periodically as you develop new leads. Persons to be interviewed should be divided up geographically to prevent wasted inspection time. Review information that you have on each person to be interviewed before visiting them. Prepare a listing of questions or areas that you want to develop for each witness to preclude the necessity for subsequent interviews. Decide on the duties of each inspector prior to the interview. Normally, one will handle the interviewing and one will take the notes.

b. Interview.

(1) Inspectors must use tact and conduct themselves in a professional manner when conducting interviews. This is particularly important when

talking to nonindustry members. When conducting interviews, be certain that you are talking to those persons who are knowledgeable in the matters you are investigating. At the retailer's premises this will usually be the owner(s), or the manager.

(2) When entering the retailer's premises, move to an uncrowded area of the room. Try to visit a retailer at a time when he will not be busy. Identify yourself in a manner which will not embarrass him in front of his customers or employees. Put the retailer at ease with some small talk and routine questions.

(3) Do not ask the retailer if he would like to make a statement; this could frighten him off and he may be evasive or refuse to tell you anything. Obtain all the information you can during your conversation, so that if he later refuses to sign a statement you will have the information.

(4) If during an interview you have good reason to suspect that the industry member or retailer is lying to you, it may be advisable to inform him of the penalties provided in 18 U.S.C. 1001 for making false statements or of the misprision of felony statute, Title 18 U.S.C. Section 4. (Whoever, having knowledge of the actual commission of a felony cognizable by a court of the United States, conceals and does not as soon as possible make known the same to some judge or other person in civil or military authority under the United States, shall be fined not more than $500 or imprisoned not more than 3 years, or both.) However, this procedure should be used judiciously.

(5) Inspectors should be discreet in questioning or making inquiries of individuals. The target of the investigation should not be mentioned and disparaging remarks should never be made against other firms or individuals.

(6) Inspectors have no authority to grant any form of immunity to any individual in return for information. Only the US attorney can grant immunity.

(7) Many retailers are reluctant to give information for fear that the State will become aware of the information and take punitive action against their licenses. Inspectors are not in a position to reassure or promise a retailer that the State will not acquire the information. A promise of this type is a form of immunity, and even though ATF normally takes no action to refer the matter to the State, the State could eventually obtain the information under the Freedom of Information Act.

(8) Through deliberate questioning, explore all the possible ways that money could have been furnished to the retailer. Anticipate and be prepared to rebut arguments presented by the retailer. For example, if he states that he buys "X" brands because they are cheaper, mention some other competing brands that are just as cheap or cheaper.

(9) To prove exclusion, it is sufficient to obtain a statement from the retailer admitting that he purchased "X" brand and quit buying "Y" brand because of an inducement. If the retailer will not admit that the inducement had anything to do with the buying of the product, try to graph the purchases from the records. The period to be graphed will include retailer purchases for a period of several months before and after the receipt of the inducement. Graphs with good exclusion will resemble an irregular "X." Attached is exhibit 3 showing a graph depicting the exclusion of another industry member's products. If the inducement was substantial, you can usually persuade the retailer into admitting that it was at least a contributing factor in purchasing the inducing industry member's products. Of course, if you can graph exclusion and have proven an inducement, a statement by the retailer is not required. All graphs should be supported by workpapers showing what the figures actually are and from where the figures were obtained. (See ATF H 5030.1, R. E. Audit Handbook, for specific guidelines on preparing workpapers.)

22. STATEMENT TAKING.

a. A sworn exclusion statement from a retailer is one of the single most important pieces of evidence an inspector can obtain. The inspector must use good sense in evaluating both the person being interviewed and the interviewee's information. Always prepare a statement, even though the retailer has told you he has no intention of signing it.

b. Two inspectors should be present when interviewing a retailer regardless of whether a sworn statement, unsigned statement, or report of interview is to be prepared. As soon as sufficient data has been obtained from the retailer, the statement should be available for the retailer to read and sign.

c. The inspector should write the statement to accurately document the facts and assure that the required elements are included. The statement should be written in the affiant's own language. Words such as inducement, exclusion, and interstate commerce should not normally appear in a statement. Each statement should completely identify the person giving the statement. Also, exclusion and inducement should be proven as completely as possible.

d. There should be an accurate description of the inducement. List all excluded brands; this will serve to show restraint of interstate commerce. The date of the inducement is very important and should also be mentioned in the statement.

e. The person being interviewed should be given a chance to read the statement and make and initial any changes, corrections, or additions. The inspector should line out any unused portions of the statement and have the interviewee initial the corrections and sign the statement. The statement should be signed by at least three persons, the interviewee plus two ATF inspectors.

f. After the statement is signed, have the interviewee raise his right hand and have an ATF inspector administer the oath. If the interviewee objects to swearing, you can substitute the word affirm in place of the word swear. Even if the retailer has lied to you, a statement for the retailer's signature should be prepared. Attached as exhibit 4 is a sample of a

sworn statement which includes all the necessary elements (see paragraph 15 for a listing of necessary elements.)

g. If the retailer won't sign the statement and you have prepared the facts of the case in statement form, allow the retailer to read the statement and then ask him if it is true and correct and if he would repeat the information at a hearing. The retailer's response should be written on the bottom of the statement form and both inspectors must certify the unsigned statement. An example of an unsigned statement is attached as exhibit 5.

h. If a signed or unsigned statement is not applicable, a report of interview should be prepared. The report of interview is primarily used when reporting interviews with third parties, competitive industry members, and others who have no obligation to talk about the matter. The report of interview should be written in the third person and be prepared immediately after the interview while the facts are still fresh in your mind. The report of interview should contain only the information that both inspectors can swear to under oath. Also, the report of interview should be signed by both inspectors. Refer to exhibit 6 for an example of a report of interview.

i. Some possible methods to be used in obtaining a statement from a retailer are listed below:

(1) Make the retailer think you know everything about the alleged inducement.

(2) Always put the retailer at ease.

(3) If true, tell the retailer that the wholesaler has already cooperated.

(4) If necessary, tactfully advise the retailer of the conspiracy statute (18 USC 371).

23. CASE REPORT.

a. Inspection reports should be clear, concise, and complete. Inspection reports should include all information necessary for management and regional counsel to make their decision. The inspector should also be aware of the fact that any action taken against a

permit by the administrative law judge at a formal hearing is based primarily on the inspection report.

b. Essentially, the report should be a vehicle for tying together all the relevant findings of the inspection, and transmitting the exhibits to the receiver. The exhibits should stand on their own merit and should need only minimal explanation.

c. As set forth in ATF O 5190.6, Resolution of FAA Act Cases by Compromise or Suspension, the following specific factors must be present and documented to the extent possible in an FAA Act case report in order to assist RE officials in arriving at a sound, uniform decision as to the offer/suspension.

(1) Evidence - All the elements necessary to prove that a particular violation of the FAA Act (permit, trade practice, deceptive advertising, deceptive labeling, and other unlawful practices) exists must be documented to the extent possible. However, the standard of proof for a criminal case is proof beyond a reasonable doubt.

(2) Willfulness - Arrow Distillers V. Alexander, 109 F. 2d 397 (7th Cir. 1940) defines willfulness as the "intentional doing of the things which the Act denounces or an intentional refraining from doing the things which the Act requires." Where possible, the inspector should document the willingness of the permittee to violate the law. For example, copies of company memoranda, conversations with company employees and company officials and any evidence to indicate the permittee was aware of what he was doing but proceeded to violate the FAA Act anyway should be documented wherever feasible. Negligence of the permittee and repeat violations may also indicate willfulness.

(3) Severity of Violations - This factor includes three related categories:

(a) Market Impact - This factor relates to the market advantage the violator gained or the market disadvantage suffered by the excluded competitors. For example, the inspector could document the amount of increased sales of the violator or the amount of decreased

sales of competitors. If an inspector shows that the violator increased his sales by $1,000 during a 3-month period, and total sales for the company (or the market area) average $500,000 per year, then RE officials can conclude that the market impact was not substantial.

(b) Seriousness of Acts - This factor relates to the relative importance of the acts committed by the permittee which resulted in violations. For example, if the violator furnished $5 gift certificates to a few local retailers, then the nature and seriousness of the violations could be considered insignificant. On the other hand, if an industry member gives large-scale rebates to interstate retailers, it could be considered a very significant offense.

(c) Extent of the Violations - This factor considers the number and type of trade buyers involved, the duration of the violations, and the geographical extent. For example, violations could be considered limited in extent if they involved one or two small, independently-owned retailers. Conversely, violations involving a national restaurant chain could be considered as very widespread.

(4) Cooperation - The inspection report should note the degree of cooperation given by the violator.

(5) Malt Beverages - If the case involves malt beverages, cite the enabling State legislation.

d. If possible, events should appear in the report in chronological sequence. The narrative report should not be long-winded. Only factual information should be included in the report. The information should be supported by the inspector's findings, other people's knowledge, or by the exhibits attached to the report.

e. Inspection reports should be submitted within ATF F 5030.9, Regulatory Enforcement Inspection Report, and should always be typed. It is also recommended that all exhibits be tabbed. To maintain uniformity in

report writing among regions, the following format for reports of FAA inspections is recommended:

(1) Federal law and regulations violated.
(2) Enabling State law (malt beverages).
(3) Synopsis.
(4) Recommendation.
(5) Statement of facts.
(6) Chronology of events (if necessary).
(7) List of exhibits.

f. The inspector should always make a recommendation based on the number, type, severity of violations, and the industry member's compliance record. The industry member's cooperation or lack of cooperation should always be mentioned. The report should also contain (normally within the statement of facts) general information on the industry member such as:

(1) Total annual liquor sales.
(2) Brands of alcoholic beverages and/or names of suppliers that industry member represents.
(3) How long the industry member has been in business.
(4) How the case was initiated.
(5) Market impact.
(6) Source of lead. (Examples, former employee, competitor.) No names to be used.

CHAPTER E. FAA INVESTIGATIONS - INSPECTION TECHNIQUES FOR SPECIFIC TRADE PRACTICES VIOLATIONS.

24. INTRODUCTION.

a. The scope of FAA compliance investigations will be dictated primarily by the type and size of business under investigation. In view of the variety of establishments at which these investigations are conducted, no hard and fast requirements for performance of the investigations will be issued. Instead, each inspector is expected to use his own initiative and judgment in determining what areas should be subject to investigation and to what extent the investigation into these areas will be pursued.

b. This portion of the FAA handbook lists, for each type of trade practice prohibited by the FAA Act, some of the more useful techniques which an inspector might use to uncover the particular type of violation. Inspectors should use these techniques as needed during the course of their investigations. Many of these techniques may be used for investigations in control States.

25. EXCLUSIVE OUTLETS. To uncover evidence that an industry member is REQUIRING a retailer to purchase his products to the full or partial exclusion of similar products of other industry members, the following techniques might be used:

a. Examine industry member's records for unusually large or frequent sales to the same trade buyer.

b. Examine retailer's records and try to determine why all, or the majority of products, are purchased from a particular industry member.

c. Examine retailer's stock to see which little known brands are carried. Check invoices to determine if they are usually sold to the retailer in conjunction with popular brands which might indicate tied-in sales.

d. Check the stock and if some popular brands are missing, or if there is an unusually large quantity of a particular product on hand, determine the reasons for it.

e. Observe chalk boards, bulletin boards, and advertising materials of industry members for evidence of special deals or conditions for sales.

f. Examine records for trends which indicate that purchases of one or more industry member's products have been substantially decreased or even discontinued in favor of increased purchases of another industry member's products (best demonstrated through the use of graphs).

g. Interview competitors who have been unsuccessful in selling to certain retailers, particularly those competitors whose business has decreased or has been discontinued at certain retailers.

h. Be alert to possible indications of deals while examining industry members' records.

i. Observe displays in package liquor stores for indications of possible deals. In bars and restaurants, see if there is one industry member who supplies an unusually large share of the wine list, well liquors, and/or draft beers.

j. Be on the lookout for contracts with stadiums or arenas which call for the industry member to make payments to the retailer or a third party (owner of stadium or arena) for advertising; e.g., scoreboard, scorecard, or signs, if the contract states or it is assumed that the industry member will have exclusive or partial sales rights. In many cases this contract is between an industry member and the owner of a stadium or arena, with the owner requiring a concessionaire (retailer) to handle specific products due to the contract between the owner and the industry member.

k. Be on the lookout for contracts between an industry member and a military installation, which requires the industry member to sell a specific product at a specific price in order to obtain the exclusive sales rights for that product.

26. TIED HOUSE.

a. Interest in Retailer's License.

(1) Check sales expense, cash disbursements and

other books of accounts of industry members for unusual entries; e.g., watch for abnormal entries near the time the fees for retailer's licenses are due.

(2) Is the industry member on the licensing board or otherwise in a position to exert influence on the issuance of a retailer's license?

(3) Examine retailer's accounts to verify disbursement for license fee, and look for unexplained receipt of funds.

(4) Check RLD corporate stock record (if applicable).

b. Interest in Retailer's Business Property.

(1) Examine lease and/or purchase agreements relating to the real and personal property used in conducting the business.

(2) Examine retailer's loan agreements with bank for cosigners. Note: Industry members that are natural persons (e.g. sole proprietors), or partnerships of five or fewer individuals are protected by the Right to Financial Privacy Act of 1978. Check with regional counsel on how to best proceed if financial information is sought on persons covered by the act.

(3) Examine real estate tax records. Verify that these taxes are actually paid by the retailer from business funds.

(4) Check appropriate court records to establish registered owner of real property.

(5) If real property is leased, check for hidden ownership of the property by an industry member through corporations, holding companies, or "fronts."

c. Furnishing Things of Value to Retailers.

(1) Observe whether industry members have on their premises items of value which are generally used at retailers' premises. If so, inquire into the distribution of these items.

(2) Observe what equipment, fixtures, signs, etc., are on the retailer's premises. Examine lease or purchase agreements covering these items, and verify payments made.

(3) Examine industry member's books of accounts for questionable disbursements. Inquire about specifics of disbursements listed under broad labels, such as advertising or promotional expenses.

(4) In unusual cases, and with the area supervisor's concurrence, take an inventory and make an accounting of selected brands of products. Unexpected shortages at industry member's premises and unexplained overages at retailer's premises may have resulted from free products.

(5) Check new bar accounts for significant increases in a retailer's purchases of particular products to see if the date of purchase falls close to the date on which new items or extra services were furnished by the industry member.

(6) Compare the number of packages shown on a sales invoice with the delivery receipt or bill of lading to determine number and value of packages received. The absence of a discount on a particular liquor with a set discount, may be a "coverup" for a subsidy item.

(7) Determine from industry member's sales records if the subsidy item is offered to all his accounts or only to a "select" group.

(8) Examine industry member's sales invoices to determine if:

(a) Different prices are charged to different retailers for the same item? Why? Is it a coverup for repayment of a loan or equipment furnished or other illegal practice?

(b) They contain evidence of add-ons or additional payments or charges (may indicate paying off a loan or making payments on equipment by the retailer).

(c) Unusual discounts or rebates may in fact be "hidden payments" to be applied on the retailer's debt.

(d) Special annotations are made, which could indicate free goods or free glassware, etc. Make notes or obtain copies of a selected number of sales invoices for comparison with the retailer's purchase invoices.

(e) The industry member is charging the retailer all required taxes; i.e., State sales tax, and deposit charges.

(9) Check credit memos for return merchandise which may not have been returned (inventory records should reflect returned goods).

(10) At the industry member's premises be on the lookout for purchases of items by the industry member which appear to be overpriced in relation to their apparent value. This could be a bogus purchase to cover up the purchase of inducing materials.

(11) Check industry member's sample accounts to insure that samples are reasonable and that records required under ATF Ruling 75-23 are being kept.

(12) Examine the salesmen's expense accounts to ascertain if there has been any obvious cash generation or annotations indicating cash payments or free goods.

(13) At a supplier's premises check the daily summary of removals against the IBM printout and invoices. Overstatement on summary records could indicate generation of free goods.

(14) At a wholesaler's premises examine purchase invoices looking for special reductions in price, which could indicate the wholesaler is receiving money from his supplier for unlawful purposes.

(15) Check the paid bills at an industry member's premises for evidence of payments on behalf of a retailer. An example of this would be a brewer

reimbursing a wholesaler for draft system work that he did at a retailer's premises.

(16) Establish product laid-in cost using wholesaler's product cost printout or execute list of selected products reflecting F.O.B., plus freight, plus sales tax, less applicable promotion depletion allowance. Compare laid-in cost to prices reflected on disposition invoices.

(17) Check with bankruptcy courts to determine whether industry members have claims on file against bankrupt retailers for unpaid equipment or loans.

d. Compensating Retailers for Advertising, Displays, or Distribution Service.

(1) Check books of accounts for indications that industry members are reimbursing retailers for advertising, displays, or distribution service through the use of discounts, rebates, and credits.

(2) Check trade publications, brochures, and advertising media for indications of cooperative advertising.

(3) Discreetly contact advertising agencies when you find indications that an industry member is subsidizing a retailer's advertising.

(4) Check industry member's sales invoices and credit memos for "special deals" given only to selected types of accounts. Such deals may in fact be a "kickback" for displaying advertising material or the payment for prominent shelf space.

(5) Determine if industry member stocks the displays in package stores and chain stores. Who determines locations of individual displays or shelf space? Is retailer compensated for prime display space or for inside signs being displayed in prime spots?

e. Guaranteeing a Retailer's Financial Obligations.

(1) Check with financial institutions to ascertain the facts if you find indications that an

industry member may be guaranteeing loans to a retailer. Note: Industry members that are natural persons (e.g., sole proprietors), or partnerships of five or fewer individuals are protected by the Right to Financial Privacy Act of 1978. Check with regional counsel on how to best proceed if financial information is sought on persons covered by the Act.

(2) Inquire from known reliable industry members whether any retailer has requested financial aid from them.

(3) Particularly in new establishments, examine documents relating to loans to determine whether they have been cosigned or otherwise guaranteed by industry members.

(4) Check with equipment suppliers to determine if an industry member has in any way guaranteed payment for the retailer's debts.

f. Extending Excessive Credit to Retailers.

(1) Ascertain the usual and customary credit period for the locality.

(2) Examine salesmen's order forms for indications of special dating on forms, and compare these forms with the related invoices. Watch for an unusually long timespan between the date of order forms and invoices.

(3) Check invoices against delivery papers, being alert for delivery dates which precede invoice dates.

(4) Ascertain if credit cards are being used to extend credit beyond the usual period.

(5) Check the perpetual record account maintained for each customer by the industry member to determine whether current payments are applied to current orders, and whether the excess, if any, is applied to previous deliveries.

(6) Examine, if possible, retailers' canceled checks to determine if they were timely cashed by the industry member.

g. Requiring Retailers to Take a Quota of Goods.

(1) Check industry member's invoices to see if certain new or unpopular brands are always sold in conjunction with a popular brand. If there is a constant ratio between the two, determine whether the retailer must buy a certain minimum of the unwanted brand in order to get a popular brand.

(2) Check retailer's stock to see if there is any excess of certain brands, particularly unpopular brands, sold by the industry member from whom popular brands are purchased. Are there unusually large amounts of an exclusive item on hand?

(3) Ascertain whether retailers have been selling certain brands at very small or no-profit prices. If so, determine whether the practice has been of long duration and why they continue to handle those brands.

(4) If industry members have granted exclusive franchises for some brands to certain retailers, question other retailers who have tried to purchase those brands to determine whether "quotas" have been proposed to them.

(5) Does the retailer use an expensive bar liquor that is not indicative of the general tone of the establishment? If so, why?

27. COMMERCIAL BRIBERY.

a. Compare seller's invoices of cash sales with buyer's invoices.

b. Check on ultimate disposal of products withdrawn as donations or gifts from the industry member's premises.

c. Check the industry member's cash disbursement and sales expense records.

d. Question competitors who feel they have been excluded.

e. At high volume RLD's, check invoices to determine if orders for the fast-selling items are placed directly with factory representatives.

f. Do the industry member's salesmen offer gifts, bonuses, or premiums to employees of trade buyers?

g. Are private side payments or gifts made to waitresses or bartenders for pushing certain products or for using them as pouring whiskeys?

h. Determine how the industry member got his new products into an account.

28. CONSIGNMENT SALES.

a. Check industry member's copies of invoices for any marks or notes which may denote special conditions.

b. Determine if the reason some merchandise on proprietor's inventory sheets is not priced out is because it is on consignment.

c. Check proprietor's credit memos for returned merchandise to determine whether it is merchandise they sold. Does the invoice reference another invoice which ties the returned merchandise to a sale? Can this invoice be connected with returns of the same type of merchandise from another trade buyer? If so, gather the details.

d. A good time to check for consignment sales would be after holidays and plant shutdowns.

RECAP TABLE - TRADE PRACTICE VIOLATIONS

The table below lists the elements necessary for showing a violation under the subdivisions of section 5 of the FAA Act.

Violation	Require by Agreement or Otherwise	Inducement Offered	Inducement Accepted	Exclusion - Whole or in Part	FAA Adopted or Similar State Law	I/State Commerce Affected Directly or Indirectly
Exclusive Outlet	yes(R)			yes	*yes	yes
Tied House		yes(R)	yes	yes	*yes	yes
Commercial Bribery		yes(TB)	Not Req.***	yes	*yes	yes
Consignment Sales		yes(TB)	Not Req.***	yes no**	*yes	yes
Deceptive Labeling					*yes	yes
Deceptive Advertising					*yes	yes

*To prove a violation of a transaction involving malt beverages, the State in which the violation is alleged to have occurred must either have adopted the pertinent section of the FAA Act, or it must have a similar State law. The State law affected need not be a State liquor law. On sales of malt beverages to the military, section 5 of the Act applies if: (1) The State does not have a treaty with the United States giving the State the power to govern sales of alcoholic beverages on military installations; or (2) the State does have a treaty with the United States and has enacted similar legislation. Section 5 of the Act does not apply if the State has a treaty with the United States and has not enacted similar legislation.

**Exclusion is not required to be shown on consignment sales across State lines; otherwise, it is a required element.

***An accepted offer of commercial bribery or of a consignment sale is not required if the offer itself induced the trade buyer to purchase the industry member's products.

(R) Retailer

(TB) Trade Buyer

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11/8/79
Exhibit 1

Rulings Pertaining to Trade Practices
(Section 5a.-5d. of FAA Act)

Section 5(b) Tied House

(1) Interest in retailer's license.

R.R. 56-384 The ownership in whole or in part of a retail establishment by an industry member.

(2) Interest in real or personal property of retailer.

R.R. 56-384 Same as above.

(3) Furnishing, giving, renting, lending, or selling to the retailer, any equipment, fixtures, signs, supplies, money, services or other things of value subject to certain exceptions.

R.R. 54-131 Premium offer in connection with the sale of wine.

R.R. 54-151 Sale or gift of glassware to retailers by producers, importers, and wholesalers of beer.

R.R. 54-161 So called "free goods" discounts, rebates, refunds, and price reductions, which are merely methods used to arrive at the agreed sales price, may not involve a quota.

R.R. 54-175 Furnishing of barbecue sets and other articles of value by producers, importers, and wholesalers to retailers.

R.R. 54-177 Purchase of equipment by retailers on advice from brewer.

R.R. 54-261 Devoting advertising space to a retailer.

R.R. 54-262 The sale to retailers of imported wine in decanters, the bottoms of which are designed to hold musical movements.

R.R. 54-295	A "spectacular sign" on the wall or roof of a building occupied by a retailer may or may not result in "inducement" or "exclusion."
R.R. 54-303	Liquor sold to retailers in connection with a credit card system.
R.R. 54-337	Furnishing of outside signs would be a violation if the elements of "inducement" and "exclusion" are present.
R.R. 54-355	Payment of dues by wholesalers to an association composed of both wholesaler and retailer.
R.R. 54-377	Wholesaler coupon distributing scheme.
R.R. 54-577	Scope of restriction on outdoor signs advertising malt beverages.
R.R. 54-622	Contract between a wholesaler and credit corporation issuing customer credit cards which are honored by the corporation's franchise retailers.
R.R. 55-166	Theft insurance furnished retailers by wholesalers or producers of distilled spirits or wine.
R.R. 55-167	Pouring rack with bottles of distilled spirits or wine furnished retailers by producers or wholesalers.
R.R. 55-168	Membership by retailers in an organization which is a nonprofit corporation formed to induce convention groups to hold conventions in the city in which the organization is located.
R.R. 55-401	The purchase of tickets to a retailer's open house would result in a violation of the FAA Act if the purchase of such tickets results in the proscribed "inducement" and "exclusion."
R.R. 55-551	Promotional scheme involving a mail-in card entitling a consumer to a free

	drink with the distiller compensating the tavern owner.
R.R. 55-567	The sale by an industry member to retailer, for resale to consumer, of wrought iron cradles bearing advertising matter for use in holding gallon bottles would not fall within any of the exceptions to the FAA Act.
R.R. 56-204	FAA Act does not forbid cooperative purchasing by alcoholic beverage retailers.
R.R. 56-205	Brewer selling beer dispensing units to retailers for resale to consumer.
R.R. 56-206	Wholesaler furnishing stamps redeemable for premiums to retailer.
R.R. 56-629	Wine cask modified for use as a display is considered to be "equipment" or "fixtures."
R.R. 56-646	The practice of an industry member furnishing entertainment or sponsoring a show on a retailer's premises would be considered a "service" or "thing of value."
R.R. 56-647	Industry members furnishing or selling signs or displays to retailers.
R.R. 61-78	Electric beer can openers are an item of equipment. Also section 5(b) is applicable to post exchanges and clubs selling beer on military reservations.
R.R. 62-223	WLD furnishing "Texas" hats and shirts to his salesmen for the purpose of advertising a product in connection with the use of the term "Texas Fifth" and whether "Texas" hats may be furnished to retailers for display purposes.
ATF Rul-74-6	Free goods, discounts, rebates given to retailers.

ATF Rul-74-12	Suppliers, by accepting payment for merchandise and agreeing to delay delivery, would be furnishing a service or a thing of value to retailers.
ATF Rul-75-23	Records of "salesman's samples" of distilled spirits.
ATF Rul-75-33	"Free goods," furnished by an industry member to a retailer on the purchase of specific quantity of alcoholic beverages, must be identical to the alcoholic beverages furnished.
ATF Rul-76-16	Free goods-discounts-rebates to retailers.
ATF Rul-76-23	Participation of industry members in retailer associations.
ATF Rul-77-4	Rotation of wines at retail premises.

(4) Paying or crediting the retailer for any advertising, displays, or distribution service.

R.R. 54-176	Contributions by wholesale liquor dealers to retailers for advertisement announcing the renovation of a retailer's cocktail lounge.
R.R. 54-260	Sale by nonindustry members to retail liquor dealers of a booklet containing a blank telephone directory, recipes, and advertisements of distillers.
R.R. 54-620	Distribution of advertising booklet to consumers.
R.R. 54-621	Payment to retailers for advertising brochure may be violation of Act.
R.R. 55-42	Retailers' advertising specialties furnished by industry members to retailers which bear advertising matter of the industry member furnishing them may also bear the name or name and address of the retailer to whom furnished.

R.R. 55-403 Consecutive use of advertising, signs, poster, and displays in more than one retail establishment.

R.R. 55-568 Cost for distributing book matches bearing an advertisement of a distiller's products.

R.R. 56-628 Industry member rented display space on a retailer's premises.

(5) Guaranteeing any loan or the repayment of a financial obligation of the retailer.

(6) Extending the retailer credit for a period in excess of that usual and customary to the industry.

R.R. 54-162 A retailer whose account is in arrears may place a current order and simultaneously make a payment equal to or greater than the value of the order.

R.R. 58-136 Liquor wholesaler extending credit to State liquor control commission.

(7) Requiring a retailer to take and dispose of a certain quota of a product.

R.R. 58-121 Wholesale liquor dealers selling at special combination price to retailer.

Section 5(c) Commercial Bribery

R.R. 54-286 The furnishing of a gift by a producer, importer, or wholesaler of distilled spirits or wine to a retailer or to an employee of a wholesaler or retailer is forbidden.

ATF Rul-76-23 Contributions by an industry member to a group or association of trade buyers' employees (I.C. 79-9). *

ATF Rul-77-17 Sales promotion contests.

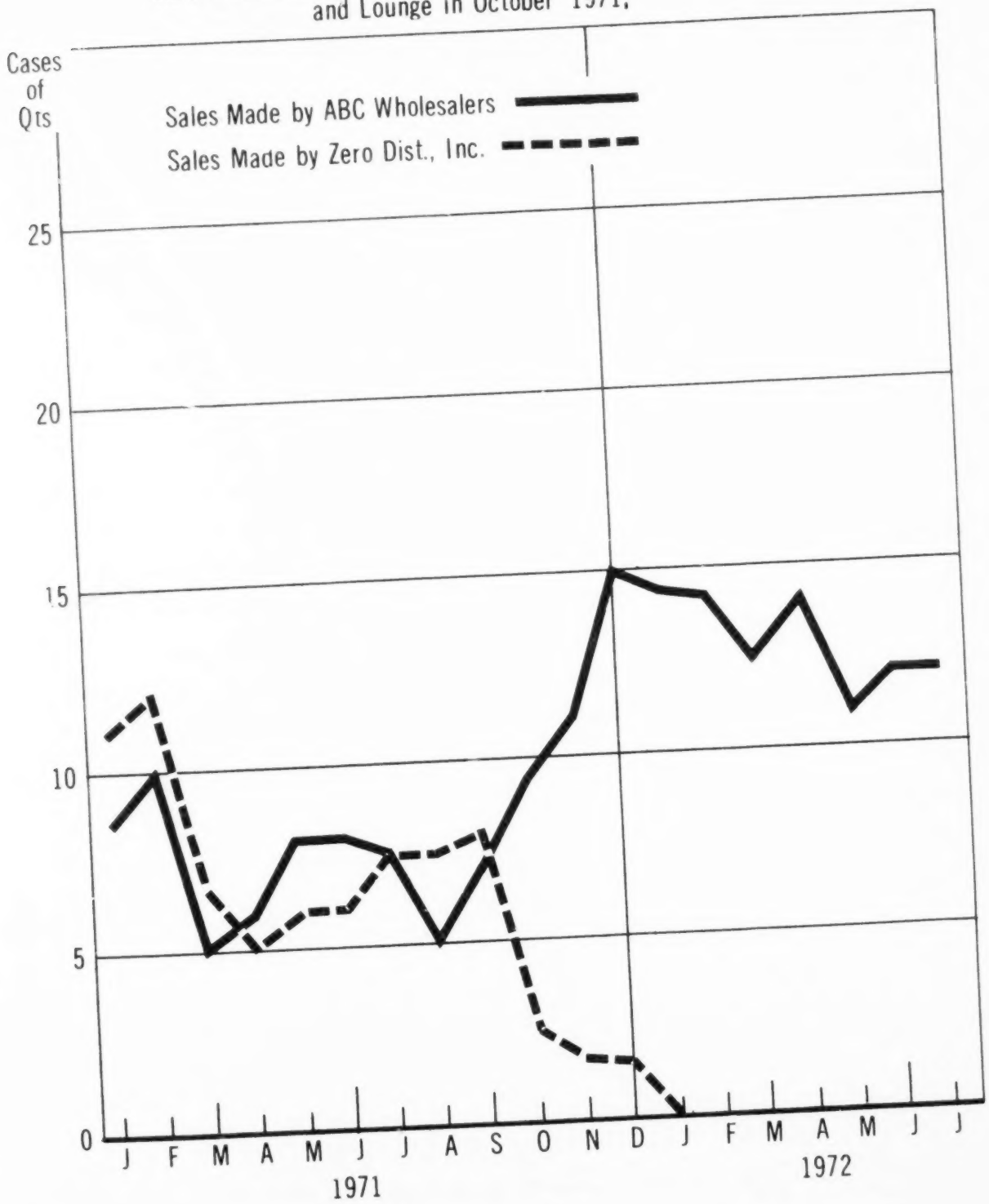
R.R. 54-279 A monopoly State may return whisky for cash or credit provided that no privilege of return was reserved when the whisky was originally purchased.

R.R. 54-509	Acceptable returns of goods to wholesalers by retailers.
R.R. 56-650	Exchanges of alcoholic beverages between industry members and trade buyers.

SAMPLE OF GRAPH SHOWING EXCLUSION

SALES OF RED RIVER RYE TO 5TH STREET BAR AND LOUNGE

ABC Wholesalers Suspected of Loaning Money to 5th Street Bar and Lounge in October 1971.



ATF H 5190.1
11/8/78
Exhibit 4

EXAMPLE OF SWORN STATEMENT

DEPARTMENT OF THE TREASURY · BUREAU OF ALCOHOL, TOBACCO AND FIREARMS

AFFIDAVIT

PAGE 1 OF 1 PAGES

I, James L. Stinson, state that

I reside at 234 Cedar Drive, Washington, D.C.

I am 38 years of age, single, and am the owner and manager of the Blue Lounge at 31 Cedar Avenue in Alexandria, Va. On or about June 26, 1971, I was approached by Dave Kingman, A sales representative for the Blue Sky Brewing Company of Erie Pa.

Mr. Kingman offered to install Free a new ~~four~~ three barrel portable keg cooler if I would switch my tap beer from "Old Mr. Best" to his brewery's brand of "Clear Water" to which I agreed. Kingman further said that the Joe Robb Distributing Co., his local "Clear Water" distributor, would install and service the cooler free of charge so long as I tapped "Clear Water" exclusively. The bargain was kept by Joe Robb of Robb Distributing Co. My first purchase of "Clear Water" was made on July 23rd 1971 (Invoice # 37679), and I have purchased no other brand of keg beer since.

I have read the foregoing statement consisting of 1 pages, each of which I have signed. I fully understand this statement and it is true, accurate and complete to the best of my knowledge and belief. I made the corrections shown and placed my initials opposite each. I made this statement freely and voluntarily without any threats or rewards, or promises of reward having been made to me in return for it.

SIGNATURE OF AFFIANT: James L. Stinson

DATE: August 1, 1972

SUBSCRIBED AND SWORN TO BEFORE ME THIS 1st DAY OF August, 19 72 AT Alexandria, Virginia

SIGNATURE: George Miller

TITLE: Special Inspector, Bureau of Alcohol, Tobacco, and Firearms

WITNESS

SIGNATURE: Frank Duffy

TITLE: Inspector, Bureau of Alcohol, Tobacco and Firearms

ATF F 5000.1 (6-74)

ATF H 5190.1
11/8/79
Exhibit 5

EXAMPLE OF UNSIGNED STATEMENT

DEPARTMENT OF THE TREASURY BUREAU OF ALCOHOL, TOBACCO AND FIREARMS

PAGE 1 OF 1 PAGES

AFFIDAVIT

I, James R. Black, Sole Owner Of The "Pink Lady" state that

I reside at 320 Fir Street, Alexandria, VA 22056

I am 36 years Of Age, Divorced, And Am The Owner And Manager Of The "Pink Lady" Bar Located At 125 Main Street, Alexandria, Va. 22112. I Have Taken "Clearwater" Ke. Beer Exclusively Since August 9, 1971 Then I Switched Two Of My Taps From Krueger's To It. The Reason I Switched From "Krueger's To "Clear Water" Is That Dave Kuhlman, The Sales Representative For The Blue Sky Beverage Co. Of Erie, Pa. Offered To Stand Half My Removeable Cost When I Replaced Back Bar, Sink, Wash Station And Beer Cased Goods Cooler. The Total Cost Of This Equipment To Me Was Approx. $1467.00 As Shown On Ray's Equipment Supply Invoice #14676, Dated August 23rd, 1971. Ray's Equipment Supply Later Issued Me A Credit For Half That Amount, But I Have Either Misplaced Or Lost It. Neither My Krueger's Ke. Distributor Nor Any Of My Cased Goods Beer Distributors Would Stand Any Of My Removeable Cost, Which Is Why I Switched From "Krueger's" To "Clear Water" Ke. Beer.

James R. Black read this statement and stated that it was true and correct. He refused to sign without advice of legal counsel. He stated that he would repeat this statement in a hearing if necessary.

George Wheeler, Special Insp., BATF

Frank Duffy, Insp. BATF

I have read the foregoing statement consisting of _____ pages, each of which I have signed. I fully understand this statement and it is true, accurate and complete to the best of my knowledge and belief. I made the corrections shown and placed my initials opposite each. I made this statement freely and voluntarily without any threats or rewards, or promises of reward having been made to me in return for it.

SIGNATURE OF AFFIANT | DATE

SUBSCRIBED AND SWORN TO BEFORE ME THIS _____ DAY OF _____, 19____ AT _____

SIGNATURE

TITLE

WITNESS

SIGNATURE

TITLE

ATF F 5000.1 (6-74)

EXAMPLE OF A REPORT OF INTERVIEW

REPORT OF INTERVIEW
with Bill E. Blaine on September 2, 1972
at the Golden Pizza Tap
186 Curio Avenue, Alexandria, VA,
by Special Inspector Jacques Clouseau
and Inspector Bilbo Baggins
Mr. Blaine stated as follows:

He is the owner of the Golden Tap which he purchased in May 1970. Black Velvet was the only beer on tap when he purchased the restaurant.

Mustapha Mond, the sales representative for Blue Sky Brewing Company of Erie, PA, approached him sometime in May 1970, after he had bought the business. The keg beer cooler then in use would only hold 6(1/2) barrels of beer, which was not large enough for the business and the storage of raw food materials for the making of pizza which he started upon opening the business. Mr. Mond offered to pay half the cost of a new larger keg cooler if he would switch his three taps from Black Velvet to Mr. Mond's brand of keg beer, "Clear Water," to which he agreed. He has tapped nothing but Clear Water since then, starting with his first 20(1/2) barrel purchase of it on June 4, 1970, as reflected on Blue Sky Invoice #68246 of that date.

The brewery subsequently issued him credit memorandums for 32(1/2) barrels of beer to pay their half ($500) of the cooler. Blue Sky credit memorandum numbers 18629, 19513, 20642, and 21446, each with 8(1/2) barrels of stale or frozen beer, covers the brewer's part of the cooler cost, since no such beer was ever returned to the brewery.

Blue Sky's willingness to pay half the cooler cost did affect his decision to switch from Black Velvet to Clear Water keg beer. Mr. Blaine would not give us a written statement of any type, but if he has to appear at a hearing, he will tell the truth.

Jacques Clouseau
Special Inspector

Bilbo Baggins
Inspector

FAA ACT SELECTED REFERENCES

ITEM	FAA ACT	FAA REGULATIONS	RUL.
1. Basic Permits	Sec. 3 27 USC 203 P 24846 4 27 USC 204 P 24857	27 CFR 1.1 through 1.59	57-25, 26
2. Unfair Competition and Unlawful Practices	Sec. 5 27 USC 205 P 24867	27 CFR 6.20	(Beer) 56-384; 58-121
a. Exclusive Outlet	P 24867		" 56-384; 628
b. Tied House	P 24868		" ATF Ruling 77-17
c. Commercial Bribery	P 24869		
d. Consignment Sales	P 24870		
e. Credit	P 24868 (6)	27 CFR 8.1 through 8.21 P 22051 through P 22082	
f. Quotas	P 24868 (7)	27 CFR 6.21 through 6.31	
g. Exceptions		27 CFR 3.1 through 3.25	
3. Bulk Sales and Bott.	Sec. 6 27 USC 206 P 24878		
a. Violation	P 24381		58-562
4. Interlocking Directorates	Sec. 8 27 USC 208 P 24884		
a. Violation	P 24891		
5. Penalties	Sec. 7 27 USC 207 P 24883		
a. Violation Sec. 3 or 5	P 24883		

ATF H 5190.1
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Exhibit 7

FAA ACT SELECTED REFERENCES

ITEM	FAA ACT	FAA REGULATIONS	RUL.
6. Misc. References			
a. Signs		27 CFR 6.23 through 6.23(b)	54-295, 337, 55-403; 56-647
b. Refills	IRC Sec. 5301 P 23783 5604 P 23986 (12) 5604 P 23986 (19) 5606 P 23989		
c. Cifts, Services, and Discounts to Ret.		27 CFR 6.1 through 6.31	54-131, 151, 175, 177, 262, 303, 355, 377, 620 622, 161; 55-42, 166, 168, 213, 401, 551, 567 56-205, 204, 206, 628, 629; 57-428; 61-78; 62-Ind. Cir. 70-24, Ind. Memo 70-3, ATF Rulings, 74-6, 74-12, 75-23, 33, 76-16, 23, 77-4
d. Other			
1. Taste Test			54-31
2. Sales between Brewers			57-25
3. Stores in Nat. Parks			58-20
4. Military Mess			60-264
5. Spec. Tax			57-149; 60-354; 63-12; 70-387

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